No. 83-1080

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

IOWA POWER & LIGHT COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Of Counsel:
DONALD E. ENGLE
Senior Vice President
—Law & Government Affairs

NICHOLAS P. MOROS
General Counsel
—Administrative Law

BURLINGTON NORTHERN
RAILROAD COMPANY
176 East Fifth Street
St. Paul, Minnesota 55101

BETTY JO CHRISTIAN *
EDWARD R. LEAHY
CHARLES G. COLE
STEPTOE & JOHNSON
Chartered
1250 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 862-2000

**Counsel of Record for Respondent Burlington Northern Railroad Company*

Dated: April 4, 1984

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Interstate Commerce Commission can correct its own legal error by permitting a wrongfully rejected tariff to take effect as of its original effective date.

LIST OF CORPORATE SUBSIDIARIES AND AFFILIATES OF BURLINGTON NORTHERN, INC.:

BN FINANCIAL SERVICES INC.

BURLINGTON NORTHERN AIRMOTIVE INC.

BURLINGTON NORTHERN INTERNATIONAL SERVICES INC.

BURLINGTON NORTHERN RAILWAY COMPANY

- The Belt Railway Company of Chicago
- Camas Prairie Railroad Company
- Chicago Union Station Company
- Davenport, Rock Island and North Western Railway Company
- The Denver Union Terminal Railway Company
- Galveston Terminal Railway Company
- Houston Belt & Terminal Railway Company
- Iowa Transfer Railway Company
- Kansas City Terminal Railway Company
- Keokuk Union Depot Company
- The Lake Superior Terminal and Transfer Railway Company
- Longview Switching Company
- The Minnesota Transfer Railway Company
- Paducah & Illinois Railroad Company
- Portland Terminal Railroad Company
- The Pueblo Union Depot and Railroad Company
- The Saint Paul Union Depot Company
- Terminal Railroad Association of St. Louis

Trailer Train Company

The Wichita Union Terminal Railway Company

Winona Bridge Railway Company

COLT INTERMODAL INC.

THE EL PASO COMPANY

GLACIER PARK COMPANY

GLACIER PARK LIQUIDATING COMPANY

MERIDIAN LAND & MINERAL COMPANY

MILESTONE PETROLEUM INC.

Butte Pipe Line Company

Portal Pipe Line Company

NEW MEXICO AND ARIZONA LAND COMPANY

PLUM CREEK TIMBER COMPANY, INC.

R-M HOLDINGS CORPORATION

The El Paso Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1080

IOWA POWER & LIGHT COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Burlington Northern Railroad Company[1] respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

---

[1] Burlington Northern Railroad Company, a party to the proceeding before the ICC, was granted intervention of right by the Eighth Circuit, and hence is a proper respondent in this case.

COUNTER-STATEMENT

The decision below upholds an order of the Interstate Commerce Commission ("ICC") that corrects a prior legal error by permitting a wrongfully rejected tariff to take effect as of its original effective date. The Statement provided by petitioner Iowa Power and Light recites the chronology of events preceding the decision at issue here, but fails entirely to make clear the context of Congressional deregulation in which these events occurred, the nature of the ICC's original error, or the rationale for the ICC's correction of that error.

A. ICC Jurisdiction Under the Staggers Act

Until 1976, the ICC had jurisdiction over all transportation rates charged by railroads under the "just and reasonable" standard of the Interstate Commerce Act. 49 U.S.C. §§ 1(5), 15(1) (1970). During the 1970's, however, Congress began to consider the impact of regulation on the railroads' need to achieve adequate revenues to assure their continued existence.

In the 4-R Act of 1976,[2] Congress sought to reduce the regulatory burdens on railroads by limiting the ICC's jurisdiction to situations in which particular railroads had "market dominance" over the traffic involved. 49 U.S.C. § 1(5)(b) (1976). Determinations of market dominance, however, were still vested in the discretion of the ICC. The ICC adopted a relatively broad interpretation of market dominance that assured continued ICC jurisdiction in most cases.[3]

Thereafter, in the Staggers Rail Act of 1980,[4] Congress, for the first time in almost 100 years, specifically curtailed

---

[2] Railroad Revitalization and Regulatory Reform Act, Pub. L. No. 94-210, 90 Stat. 31 (1976).

[3] Burlington Northern Railroad v. ICC, 679 F.2d 934, 936 (D.C. Cir. 1982).

[4] Pub. L. No. 96-448, 94 Stat. 1895. The Staggers Act was explicitly predicated on findings that railroad revenues were insuffi-

the rate reasonableness jurisdiction of the ICC by legislating a numerical "jurisdictional threshold." The jurisdictional threshold is set forth in the statute as a ratio of a rail carrier's revenues to its variable costs for a particular movement. A rate which yields a ratio below that threshold is conclusively presumed to be just and reasonable and therefore not subject to ICC scrutiny. 49 U.S.C. § 10709(d) (Supp. V 1981). For rates above the jurisdictional threshold, the Commission generally retains its jurisdiction to make market dominance determinations and assess the reasonableness of those rates.[5]

In the Staggers Act, Congress also specifically authorized rate contracts between carriers and shippers. 49 U.S.C. § 10713 (Supp. V 1981). The ICC's jurisdiction over such contracts was strictly limited by the Act (49 U.S.C. § 10713(d)(2)(A)), and enforcement of both Staggers Act contracts and lawful pre-Staggers contracts was vested exclusively in the courts. 49 U.S.C. § 10713 (i)(2) (Supp. V 1981).

B. The Commission's Wrongful Rejection

In the wake of the Staggers Act and its newly established jurisdictional limits on the ICC, Burlington Northern Railroad Company ("BN") filed a tariff supplement to increase the unit train rate on coal from Belle Ayr, Wyoming to Council Bluffs, Iowa, effective November 1, 1981. In an accompanying Advance Justification Statement, BN presented cost evidence to demonstrate that the

---

cient to maintain an adequate transportation system. Congressional Declaration of Findings, Pub. L. No. 96-448, § 2(7), 94 Stat. 1895, 1896 (1980); *see* H.R. Rep. No. 1035, 96th Cong., 2d Sess. 33, 38, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3978, 3983; *see also id.* at 115-17, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 4059-61; 125 Cong. Rec. S15,309 (daily ed. Oct. 29, 1979).

[5] Even above the threshold, the jurisdiction of the ICC is further limited by the Staggers Act to preclude its review of certain rates within a zone of rate flexibility. 49 U.S.C. § 10707a(e)(2) (Supp. V 1981).

proposed rate of $10.95 resulted in a revenue-to-variable cost ratio below the new Staggers Act jurisdictional threshold and therefore was not within the ICC's jurisdiction.

Iowa Power & Light Company ("IPL") was the only shipper using that unit train tariff. During the 20-day statutory notice period prior to the November 1, 1981 effective date, IPL did not challenge the rate as exceeding the jurisdictional threshold nor did it request that the tariff be suspended or investigated. By letter dated October 16, 1981, IPL sought rejection of the tariff by the ICC on the ground that the rate exceeded a pre-Staggers prescription order of the ICC. That prescription order had been based in part on IPL's claim that it had a "contract" with BN that specified the applicable rate.

The ICC asserted that it had jurisdiction over the rate because it violated a prior prescription order, and on October 30, 1981, it rejected the tariff. On review, the United States Court of Appeals for the District of Columbia Circuit vacated the Commission's order. *Burlington Northern Railroad v. ICC*, 679 F.2d 934 (D.C. Cir. 1982). Noting BN's unchallenged claim that the rate was below the statutory threshold for Commission jurisdiction, the Court concluded that "the Commission's decision reflects an assertion of authority inconsistent with the regime established by the Staggers Act." *Id.* at 935. The D.C. Circuit held that the Staggers Act limited the ICC's jurisdiction over rate increases tendered after the effective date of the Act, notwithstanding a prior prescription order or a pre-Act rate agreement. The Court also stated that under the statute the "exclusive remedy" for any alleged breach of contract "is a court action, not an ICC proceeding." *Id.* at 941.[6]

---

[6] At the time of the D.C. Circuit decision, IPL had already filed such a court action. Iowa Power & Light Co. v. Burlington Northern Railroad, No. 81-526-B (S.D. Iowa filed Oct. 27, 1981). In its decision, the D.C. Circuit concluded that while the Commission generally

C. BN's Refiling of the Tariff

Consistent with the D.C. Circuit opinion vacating the Commission's wrongful rejection of the original tariff filing, on July 14, 1982, BN refiled the same tariff rate ($10.35) with the same effective date (November 1, 1981) and the same Advance Justification Statement demonstrating a ratio below the jurisdictional threshold set by the Staggers Act. Because BN believed the statutory 20-day notice period had passed during October 1981, the refiled tariff was made effective on one day's notice, i.e., July 15, 1982.

On July 16, 1982, IPL filed with the Commission a petition to reject the refiled tariff, alleging that it violated the notice provisions of the Interstate Commerce Act and attempted to establish retroactive rates contrary to law. By a letter-decision dated July 16, 1982, the ICC's Chief of the Section of Tariffs rejected the refiled tariff for failure to provide 20-days' notice. On appeal, the Commission, referring extensively to the D.C. Circuit's opinion, found that it should invoke its equitable powers "solely to rectify the wrong we have perpetrated on BN due to our mistaken rejection of its tariff supplement." *Burlington Northern Railroad Company—Petition for Reconsideration of Rejection*, Docket No. 38885 (served Dec. 23, 1982), *reprinted at* Pet. App. at 18a.[7] The Commission therefore allowed BN to refile the same tariff with the original effective date of November 1, 1981 and, in an abundance of fairness to IPL, required BN to provide a 20-day notice period. In addition, the Commission stated that because it was acting under its

---

must accept a rate below its jurisdictional threshold, it would "leave to the appropriate court, in this case, the United States District Court for the Southern District of Iowa, the question of any interim or final remedy for the breach of contract alleged by IPL." 679 F.2d at 942.

[7] The petition for writ of certiorari will be cited as "Pet. at ——." The petitioner's appendix will be cited as "Pet. App. at ——." This respondent's appendix will be cited as "App. at ——."

equitable powers, it would "not require IPL to pay the entire back amount immediately." *Id.* at 19a. Rather, the Commission solicited the input of the parties to establish a "reasonable payment schedule." *Id.*

In accordance with the Commission's decision, on January 20, 1983, BN refiled for the third time the same tariff ($10.95) with the same effective date (November 1, 1981) and the same Advance Justification Statement. IPL challenged the reasonableness of the rate in a protest before the ICC, alleging that the ratio produced by the rate exceeded the jurisdictional threshold and thus the rate fell under ICC scrutiny.

By decision dated February 9, 1983, the Commission denied IPL's protest and allowed the rate to take effect as scheduled without investigation. *Retroactive Rate on Coal, Belle Ayr and Eagle Junction, WY, to Council Bluffs, IA*, Suspension Case No. 70992 (served Feb. 14, 1983), *reprinted at* App. A. The Commission found that, even if it had jurisdiction, "absent contract considerations" it did not have sufficient evidence to warrant an investigation. App. at 5a.[8] Moreover, the Commission recognized that a suit to determine the validity of the alleged contract was already pending in the district court, and "judicial enforcement of a contract could ultimately override any decision that we might make with regard to maximum reasonable rate determination." App. at 4a.[9]

---

[8] The Commission decision not to investigate or suspend the rate did not preclude IPL from initiating a rate reasonableness complaint proceeding under 49 U.S.C. § 11701(b). On October 28, 1983, IPL filed such a complaint (No. 39602), claiming that "the rate accruing to BN by reason of its retroactive supplement and continuing charges exceed (sic) a just and reasonable rate under Section 10701a of the Act." Verified Complaint at 6.

[9] Indeed, the district court in the "contract" suit later found that there existed an enforceable contract between the parties, enjoined BN from breaching that contract, and ordered BN to refund monies collected in excess of the "contract rate," plus interest. Iowa Power & Light Co. v. Burlington Northern Railroad, No. 81-526-B (S.D. Iowa Dec. 28, 1988). A stay of the refund aspect of that judgment has been granted, pending appeal.

BN's tariff, with its effective date of November 1, 1981, became the governing instrument for the movement on February 10, 1983. The ICC offered IPL an opportunity to repay the amount past due over a period of time. Pet. App. at 19a. The parties thereafter submitted evidence and argument regarding payment schedules and the question of whether interest should be allowed. On June 14, 1983, the Commission issued its final order "under our duty to effectuate the mandate of the United States Court of Appeals [for the D.C. Circuit]" and ordered repayment on a schedule not to exceed 13 months, with interest at 10.5%. App. at 9a.

D. The Eighth Circuit's Decision

On August 3, 1983, the Eighth Circuit upheld the ICC's exercise of its equitable powers to correct its prior error in its December 23, 1982 decision. *Iowa Power & Light Co. v. United States*, 712 F.2d 1292 (8th Cir. 1983), *reprinted at* Pet. App. at 1a. In its decision the Court first rejected IPL's argument that the ICC's action was inconsistent with the Interstate Commerce Act:

> Nothing in the Act expressly prohibits the ICC from allowing the retroactive application of a tariff in the limited circumstances of this case; more significantly, the challenged action is consistent with the role contemplated for the ICC under the Act.

Pet. App. at 6a.

The Court also found there was no violation of the filed rate doctrine. The Court instead found the Commission's action to be fully consistent with the two considerations or purposes of that doctrine—"preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant." Pet. App. at 6a-7a (quoting *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-78 (1981)).

The Court rejected IPL's contention that the ICC could not use equitable powers to correct its prior mistake. The Court discussed *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223 (1965), a parallel case involving a Federal Power Commission order, and stated:

> The action taken by the ICC in the present case is comparable to that upheld in *Callery Properties*—the Commission has acted to undo what was wrongfully done by virtue of its prior order rejecting the increased rate requested by BN.

Pet. App. at 8a.

Finally, the Court examined the Commission's action from the perspective of fairness to IPL and concluded that the Commission's action was not arbitrary or capricious.

REASONS FOR DENYING THE WRIT

The petition presents a single narrow question—whether the Interstate Commerce Commission exceeded its statutory authority in correcting its own legal error by permitting a wrongfully rejected tariff to take effect as of its original effective date. Petitioner makes no showing that this is a question of general interest in the federal or state courts, but rather argues that review by this Court is necessary because the Court of Appeals erred in sustaining the Commission's interpretation of its governing statute.

The decision below is sound. Both the Commission and the Court of Appeals fully considered the statutory framework of the Interstate Commerce Act and concluded that the policies supporting the "filed rate doctrine" were satisfied by the Commission's action in this case. Moreover, the decision below is consistent with the decisions of other courts recognizing that agencies have authority to correct legal errors identified by the courts.

I. THE DECISION BELOW IS NARROW IN SCOPE AND UPHOLDS COMMISSION ACTION CONSISTENT WITH THE INTERSTATE COMMERCE ACT

Petitioner requests that this Court review the "correctness of the I.C.C.'s action" in allowing the wrongly rejected tariff to take effect as of its original effective date. Pet. at 5. The Court of Appeals has already undertaken such a review, fully considered the arguments advanced by IPL, and concluded that "the Commission's action in the present case did not impermissibly conflict with the Interstate Commerce Act." Pet. App. at 1a. The petition identifies no legal error in that opinion sufficient to warrant further review by this Court.

Notably, the Court of Appeals sustained the action of the Interstate Commerce Commission only in "the limited circumstances of this case." Pet. App. at 6a. Those circumstances included: (1) a statutory curtailment of the ICC's jurisdiction; (2) a judicial determination that the Commission had exceeded its new jurisdictional limits in rejecting the tariff as originally filed; (3) the resubmission of a tariff in every way identical to the original rejected one; (4) the direct involvement of the only interested shipper in all prior proceedings; and (5) a full opportunity for protest on the part of that interested shipper. The ICC justified its action solely as a means of rectifying its earlier error (Pet. App. at 18a), and the Eighth Circuit sustained it solely on that ground.[10] Pet. App. at 9a.

Petitioner argues that the Court of Appeals should have held the Commission powerless to correct its own prior error. Petitioner relies on Commission precedents from early in this century indicating that tariffs and

[10] Subsequent to its action in this case, the ICC has refused to approve retroactive tariffs submitted in other circumstances. *See, e.g.*, Petition Under 49 U.S.C. 11501(c) for Review of an Order of the Railroad Commission of Texas, No. 39624 (served Jan. 12, 1984).

tariff changes should ordinarily not be given retroactive effect. These and similar cases were cited by IPL in both the ICC and the Court of Appeals.[11] The ICC explicitly distinguished them on the ground that the carrier in this case "timely published its tariff . . . and was denied implementation of its *prospective* rate solely due to our error." Pet. App. at 17a (emphasis in original). Hence, the ICC concluded, "Our action here is not inconsistent with the general rule." *Id.*[12]

Similarly, section 10761(a) of the Interstate Commerce Act and the filed rate doctrine present no bar to the Commission's action in this case. In its petition, IPL erroneously focuses on the first sentence of section 10761(a), arguing that that provision prevents the collection of a rate not technically "in effect" on the date of shipment. Pet. at 7. The Court of Appeals, however, soundly refuted this argument, stating:

---

[11] In general, these cases hold only that, as a matter of tariff interpretation, the tariff in effect when the movement originates is the applicable tariff. In Interstate Remedy Co. v. American Express Co., 16 I.C.C. 436 (1909), where a tariff was cancelled after movement had begun, the ICC decided that the privileges and conditions of the cancelled tariff continued to apply to shipments already in progress. *See also* The Transit Case, 25 I.C.C. 130 (1912).

In *In re* Through Routes & Through Rates, 12 I.C.C. 163 (1907), the ICC determined that a shipment commenced on a through bill of lading would be governed by those tariffs in effect at the start of the movement, regardless of increases or decreases filed on tariffs for portions of the movement during (or after) the trip. *See also* Central Lumber Co. v. Chicago, Milwaukee & St. Paul Railway, 18 I.C.C. 495 (1910); *cf.* S.A. Gerrard Co. v. Belt Railway, 270 I.C.C. 59 (1948).

[12] In any event, an agency may properly create an exception to a general rule to suit new and different conditions as long as the agency's reasons are fully explained. Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade, 412 U.S. 800, 808 (1973) (plurality opinion); *see* Borough of Ellwood City v. FERC, 583 F.2d 642, 649 (3d Cir. 1978), *cert. denied*, 440 U.S. 946 (1979).

> Although the initial sentence of section 10761(a) seemingly supports the contention advanced by IPL, we believe a reading of the provision as a whole demonstrates that it was not designed to prevent action such as that taken by the Commission in this case. The final sentence of the provision indicates that through this section Congress primarily intended to prevent carriers from discriminating among shippers.

Pet. App. at 5a (citations omitted). Because the Commission did not authorize any discriminatory departure from the tariff rate, but rather concluded that a different tariff should have been considered "in effect" during the applicable period, there was no violation of this provision.

Nor is there any inconsistency with the filed rate doctrine. The filed rate doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981). The Court of Appeals observed that the filed rate doctrine was designed to preserve the Commission's primary jurisdiction over reasonableness of rates and to insure that the agency is aware of the rates charged by regulated entities. Pet. App. at 6a-7a. After reviewing the facts,[13] the Court of Appeals found that "[t]he Commission's action in the present case is fully consistent with each of these underlying considerations." Pet. App. at 7a. The filed rate doctrine, designed to protect agency powers, should not be converted into a device for curtailing those powers.[14]

---

[13] *See* Pet. App. at 7a. The Commission itself noted that its primary jurisdiction was not compromised (Pet. App. at 18a), and both the Commission and IPL have been on notice of the proposed tariff increase since October 9, 1981.

[14] Indeed, courts have never viewed the filed rate doctrine as an obstacle to correction of an agency error by means of a retroactive adjustment. *See* Inland Steel Co. v. United States, 306 U.S. 153 (1939) (carriers awarded restitution for the period during which a

Finally, no conflict exists between the decision below and recent decisions of this Court. Nothing in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981), precludes the Commission's decision in the instant case. The natural gas producers in that case sought to achieve higher rates through a proceeding for contract damages in state court. Because those higher rates had never been put on file with the FERC, the agency specifically opposed the state court's award of damages as an encroachment on its jurisdiction. The Supreme Court endorsed that view, holding that "[n]o court may substitute its own judgment on reasonableness for the judgment of the Commission." 453 U.S. at 577.[15] *Arkansas Louisiana* did not present an instance, such as the present case, where the agency acted to correct its own legal error after judicial review of administrative proceedings.[16]

---

temporary injunction prevented the filing of higher tariff rates); Middlewest Motor Freight Bureau v. United States, 433 F.2d 212 (8th Cir. 1970) (shipper awarded restitution for the period during which a temporary restraining order prevented the filing of lower tariff rates), *cert. denied*, 402 U.S. 999 (1971); *see also* Indiana & Michigan Electric Co. v. FPC, 502 F.2d 336 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 946 (1975); Ringsby Truck Lines, Inc. v. United States, 490 F.2d 620 (10th Cir. 1973), *cert. denied*, 419 U.S. 833 (1974).

[15] In its petition, IPL cites two other cases in which the filed rate doctrine was invoked to preclude courts from providing a judicial remedy inconsistent with the agency's primary jurisdiction. T.I.M.E. Inc. v. United States, 359 U.S. 464 (1959) (Motor Carrier Act bars a common-law action for recovery of unreasonable rates); Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951) (courts may not assume agency's exclusive power to declare filed rates unreasonable). Neither of these cases holds that the filed rate doctrine may be invoked to curtail the Commission's remedial powers.

[16] Moreover, in that case the Supreme Court noted that the agency could have exercised its power to grant a waiver of the notice period to permit a retroactive change in rates, but had denied the producers' application for a waiver. *Arkansas Louisiana*, 453 U.S. at 576 n.6, 578 n.8. After the Supreme Court's decision, the Court

This Court's decision in *Burlington Northern, Inc. v. United States*, 103 S. Ct. 514 (1982), also undermines IPL's argument. The Court expressly reaffirmed the Commission's primary jurisdiction over the timing of increases in tariff rates. "'The authority to determine *when* any particular rate should be implemented is a matter which Congress has placed squarely in the hands of the Commission.'" 103 S. Ct. at 521 (quoting *Consolidated Rail Corp. v. National Association of Recycling Industries, Inc.*, 449 U.S. 609, 612 (1981) (emphasis in original)). The Court noted that judicial interference with the tariff filing system would disrupt the delicate balance of the statutory scheme, since a shipper can challenge a tariff on file by instituting a rate reasonableness proceeding, but a carrier could not obtain a Commission ruling that its filed rate was unreasonably low. 103 S. Ct. at 521. Similarly, in the instant case, the Commission soundly concluded that BN's rate should take effect as of its original effective date, since BN could not otherwise be made whole, but IPL could challenge that rate by filing a complaint with the Commission or pursuing its contract claims in court.[17]

---

of Appeals for the Fifth Circuit reversed the FERC's ruling in this regard, and directed the FERC to grant a waiver. This result, which allowed the producers to collect retroactively a higher tariff rate, was found to be consistent with the filed rate doctrine. Hall v. FERC, 691 F.2d 1184 (5th Cir. 1982), *cert. denied*, 104 S. Ct. 88 (1983).

[17] In fact, IPL is presently pursuing both remedies.

The district court in the contract action (see note 6 *supra*) has ruled that BN must return to IPL a substantial portion of the original refund and has approved a supersedeas bond in the amount of $8,100,000.00, calculated on the basis of a refund to IPL of the principal amount of $6,898,861.40. IPL has taken the position in the district court that "it does not agree with BN's calculation of the amount of the supersedeas bond" because it disputes BN's view that "not all of the coal shipped by Iowa Power to its Council Bluffs Unit No. 3 via BN falls within the terms of the contract between BN and Iowa Power." Response and Resistance to Motion to Stay Enforcement of Judgment Upon Appeal and for Approval of Super-

In short, this Court has twice recently analyzed in depth the filed rate doctrine. IPL is merely seeking review of whether the doctrine precludes the Commission itself from taking remedial action in the unique circumstances of this case. Since the decision below is reasonable in light of the facts, and such circumstances are unlikely to recur, little purpose would be served by reanalyzing the application of the filed rate doctrine in this case.

II. THE DECISION BELOW IS CONSISTENT WITH DECISIONS OF OTHER COURTS RECOGNIZING THAT AGENCIES HAVE AUTHORITY TO CORRECT THEIR OWN ERRORS

The decision below is rooted in an analysis of the Interstate Commerce Act and the policies applicable under that statute. In addition to discussing section 10761 (a), the Court noted that the Commission has statutory authority to award reparations to a railroad when a tariff is mistakenly suspended and pointed out that the ICC has explicit statutory powers to correct its own errors.[18] Pet. App. at 6a. Thus, it is open to question whether the decision below applies to other agencies subject to other statutory schemes.

---

sedeas Bond at 3, Iowa Power & Light Co. v. Burlington Northern Railroad, No. 81-526-B (S.D. Iowa filed Feb. 23, 1984).

In its complaint currently pending before the ICC (see note 8 *supra*), IPL challenges the reasonableness of the rate and seeks reparations covering the entire period and the entire movement to IPL's facilities at Council Bluffs.

[18] Two provisions of the Interstate Commerce Act recognize the Commission's power to correct its own errors. One provides that "[t]he Commission may change, suspend, or set aside any [commission] action on notice." 49 U.S.C. § 10324(b) (Supp. V 1981); *see* Southern Railway v. United States, 412 F. Supp. 1122, 1147 n.75 (D.D.C. 1976) (authorizing retroactive change in effective date of order). A second provision provides that:

However, to the extent that the decision below has any significance outside of the specific statutory context in which it was decided, it is fully consistent with the decisions of other courts dealing with analogous problems under different statutory schemes.

It is well established that courts possess the power to correct their own errors or to rectify agency errors. *United States v. Morgan*, 307 U.S. 183, 197 (1939); *Inland Steel Co. v. United States*, 306 U.S. 153, 156 (1939); *Arkadelphia Milling Co. v. St. Louis Southwestern Railway*, 249 U.S. 134, 145 (1919); *Indiana & Michigan Electric Co. v. FPC*, 502 F.2d 336, 346 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 946 (1975); *Midwest Motor Freight Bureau v. United States*, 433 F.2d 212, 226 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971). A rule that only courts could provide equitable restitution would inevitably involve a great waste of the parties' time and judicial resources for, at the conclusion of every agency proceeding in which the agency is found to be in error, the parties would be required to initiate a separate judicial proceeding to obtain relief. *See Chemical Leaman Tank Lines, Inc. v. ICC*, 593 F.2d 241 (3d Cir. 1979).

Thus, this Court has squarely held that "[a]n agency, like a court, can undo what is wrongfully done by virtue of its order." *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965). IPL contends that *Callery* is inapposite because "that case depended on the specific statutory authority given to the Federal Power Commission." Pet. at 11. However,

---

The Commission may, at any time on its own initiative because of material error, new evidence, or substantially changed circumstances— * * *

(c) change an action of the Commission.

49 U.S.C. § 10327(g)(1) (Supp. V 1981).

Callery has not been limited to situations involving an FPC certificate. *See, e.g., Taunton Municipal Lighting Plant v. DOE*, 669 F.2d 710, 715 (Temp. Emer. Ct. App. 1982); *Moss v. CAB*, 521 F.2d 298, 304 n.10 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 966 (1976).

In fact, federal courts have consistently held, in a variety of statutory circumstances, that agencies can correct their own prior errors. *Papago Tribal Utility Authority v. FERC*, 723 F.2d 950 (D.C. Cir. 1983); *Plaquemines Oil & Gas Co. v. FPC*, 450 F.2d 1334 (D.C. Cir. 1971); *Skelly Oil Co. v. FPC*, 401 F.2d 726 (10th Cir. 1968); *Southern Railway v. United States*, 412 F. Supp. 1122 (D.D.C. 1976); *cf. Nantahala Power & Light Co. v. FPC*, 384 F.2d 200, 210 n.20 (4th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968).[19]

Moreover, it is precisely this principle—the need for an agency to have sufficient authority to correct its *own* errors—that distinguishes the instant case from petitions currently pending before this Court: *ICC v. American Trucking Association, cert. granted*, 103 S. Ct. 3109 (1983); *Aberdeen & Rockfish Railroad v. United States, petitions for cert. filed*, 51 U.S.L.W. 3341 & 3394 (U.S. Oct. 22 & Nov. 12, 1982) (Nos. 82-707 & 82-804). Those petitions concern the ICC's power to reject defective tariffs filed by carriers. *ATA* involves rejection of a tariff filed by a carrier which is violative of a motor carrier rate bureau agreement. *Aberdeen* involves the ICC's power to fashion appropriate relief where a carrier initially filed a tariff with improper symbolization.

---

[19] In Mississippi River Fuel Corp. v. FPC, 202 F.2d 899 (8d Cir.), *cert. dismissed*, 345 U.S. 988 (1953), the Third Circuit found that the particular circumstances did not favor retroactive adjustment, but retroactive relief was ordered by that court a year later in a case involving the filing of an erroneous rate. Mobile Gas Service Corp. v. FPC, 215 F.2d 883, 892 (8d Cir. 1954), *aff'd sub nom.* United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956).

Neither case concerns the ICC's correction of its *own* legal error, which has been identified through prior judicial review proceedings. A decision regarding the pending petitions, hence, would not clarify the issues in this case.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

Of Counsel:
DONALD E. ENGLE
Senior Vice President
—Law & Government Affairs
NICHOLAS P. MOROS
General Counsel
—Administrative Law
BURLINGTON NORTHERN
RAILROAD COMPANY
176 East Fifth Street
St. Paul, Minnesota 55101

BETTY JO CHRISTIAN *
EDWARD R. LEAHY
CHARLES G. COLE
STEPTOE & JOHNSON
Chartered
1250 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 862-2000
**Counsel of Record for Respondent Burlington Northern Railroad Company*

Dated: April 4, 1984

APPENDICES

APPENDIX A

SERVICE DATE
FEB. 14, 1983

INTERSTATE COMMERCE COMMISSION

DECISION

Suspension Case No. 70992

RETROACTIVE RATE ON COAL, BELLE AYR AND EAGLE JUNCTION, WY, TO COUNCIL BLUFFS, IA

Decided: February 9, 1983

On January 21, 1983, the Burlington Northern Railroad Company (BN) filed Supplement 10 to its local freight tariff ICC BN 4187-B with this Commission. Supplement 10 establishes a rate of 1,095 cents per ton on coal from Belle Ayr and Eagle Junction, WY, to Council Bluffs, IA. The supplement has a general effective date of February 10, 1983, while the rate of 1,095 cents is referenced as having been in effect beginning with November 1, 1981. The tariff rate item (200-D) containing this rate is indicated as being filed under authority granted by this Commission in Docket No. 38885, *Burlington Northern Railroad Company—Petition for Reconsideration of Rejection*, decided December 9, 1982.

Also on January 21, 1983, the BN filed a memorandum and advance justification statement in connection with the said rate filing. The advance justification statement is essentially the same as the BN had filed in connection with an earlier proposal to establish the same rate in Supplement 4 to the said tariff effective November 1, 1981. Supplement 4 to tariff ICC BN 4187-B was rejected by this Commission on October 30, 1981, because the rate therein exceeded the rate level

which had been prescribed as the reasonable maximum in *Unit-Train Rates On Coal-Burlington Northern, Inc.*, 364 I.C.C. 186 (1980), *aff'd sub nom., Iowa Power and Light Co. v. Burlington Northern Inc.*, 647 F.2d 796 (8th Cir. 1981), *cert. denied*, 102 S. Ct. 1253 (1982). The basis of that prescription was the rate level that had been agreed to by the BN and Iowa Power and Light Company (IPL) in a 1976 "letter of understanding".

BN appealed the rejection. The reviewing court held that a tariff allegedly below the market dominance threshold set forth in 49 U.S.C. 10709 may not be rejected simply because the rate exceeds the level prescribed in an outstanding order or a pre-Staggers Act agreement (*Burlington Northern Railroad Company v. ICC*, 679 F.2d 934 (D.C. Cir. 1982)). The Commission's order was vacated and the matter was remanded to this Commission.

BN subsequently filed a Supplement 8 to its tariff ICC BN 4187-B on July 14, 1982, to become effective July 15, 1982. Supplement 8 was rejected by the Chief of the Section of Tariffs on July 16, 1982. The BN filed a petition for administrative review of this decision and the petition was granted by our decision dated December 9, 1982, in Docket No. 38885. The BN was authorized to refile Supplement 8 to ICC BN 4187-B on 20 days' notice with the 1,095 cent rates being shown as effective on November 1, 1981.

Supplement 10 to ICC BN 4187-B essentially comports with the decision of this Commission in No. 38885. It is filed on 20 days' notice and it indicates that the rate of 1,095 cents (absent suspension notice or rejection by this Commission) will have been in effect beginning with November 1, 1981.

IPL filed a verified complaint and petition for suspension and investigation of retroactive rate increase and investigation of prospective rate increase on January 21, 1983, with an amendment to the petition dated January

31, 1983. IPL asks suspension of the rate insofar as it would apply retroactively beginning with November 1, 1981, and investigation (without suspension) of the rate insofar as it would apply on and after February 10, 1983. Protestant IPL has submitted a cost study purporting to show that the rate of 1,095 cents reflects 223 percent of the November 1, 1981, level variable costs and 219 percent of current variable costs. IPL alleges that the rate would be 58 percentage points above the November 1, 1981, jurisdictional threshold and 49 percentage points above the currently applicable threshold. BN disputes IPL's cost showing contending, among other things, that cost data not available in October 1981 should not now be considered in connection with this rate, and, further, that the rate is less than 165 percent of variable costs.

We have considered the issues raised by the BN and IPL in the BN's statement of justification, the IPL's complaint and petition, and the BN's reply to the said complaint and petition. We have also reviewed our position in this matter.

As indicated in our decision in Docket No. 38885, *supra*, the prescription by this Commission of a maximum reasonable level for this movement was based on the Commission's recognition of the rate level that had been agreed upon by the parties in the 1976 "letter of understanding". The question of whether there is a lawful contract between IPL and BN and the binding nature of such a contract is now pending before the United States District Court for the Southern District of Iowa. Matters of contract disputes between a shipper and a carrier are best decided by the Courts. *See* 49 U.S.C. § 10713(i)(2); *see also Burlington Northern R. v. I.C.C.*, 679 F.2d 934, 942 (D.C. Cir. 1982).

Protestant IPL has alleged that the rate of 1,095 cents per ton is far above the jurisdictional threshold and that it is unjust and unreasonable.

Using the most conservative estimate, we conclude that the rate reflects approximately 200 percent of estimated variable costs at a embedded debt level. (The 200 percent estimate reflects 1981 costs, which are undoubtedly lower than most recent costs.) Based on this conclusion the rate would be above the jurisdictional threshold.

We have decided neither to suspend nor investigate the rate. Although it arguably results in a revenue-variable cost percentage that is greater than 20 percentage points above the 170 percent revenue-variable cost currently applicable under 49 U.S.C. 10709(d), neither party has addressed the so-called "Long-Cannon factors" codified at 49 U.S.C. 10707a(e)(2)(B). Because the parties have neither addressed nor submitted evidence on these factors, we have no basis upon which to consider them. We would remind the parties, however, that their failure to raise Long-Cannon factors here does not preclude their right to do so in a subsequent complaint proceeding pursuant to 49 U.S.C. 11701(b).

IPL argues for suspension and investigation of the rate because of the high revenue to variable cost ratio. However, we have recently found to be reasonable rates which have resulted in revenue to variable cost ratios equal to, or higher than, the ratio here.

Moreover, BN is a revenue inadequate carrier. In Ex Parte No. 439, *Railroad Revenue Adequacy-1981 Determination* (not printed), served November 18, 1982, BN was found to have a return on investment of only 4.29 percent. Our most recent determination of the rail carriers' cost of capital is 16.5 percent. Ex Parte No. 415, *Railroad Cost of Capital-1981*, 365 I.C.C. 734 (1982).

Because judicial enforcement of a contract could ultimately override any decision that we might make with regard to maximum reasonable rate determination (as-

suming that the court would determine that a valid contract exists), and because the evidence before us would not, in our judgment, support a decision to institute an investigation absent contract considerations, we will deny IPL's petition and allow the rate of 1,095 cents to take effect as scheduled without investigation.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioner Andre, Simmons and Gradison. Chairman Taylor concurred with a separate expression.

AGATHA L. MERGENOVICH
Secretary

CHAIRMAN TAYLOR, concurring:

I agree with the majority's decision on the merits, since, in this instance, protestant did not introduce any evidence with regard to the Long-Cannon factors set forth in 49 U.S.C. 10707a(e)(2)(B), nor did it raise any issues concerning these matters.

As indicated in *Arkansas Power & Light Co.—Amendment—Staggers Act*, 365 I.C.C. 983 (1982), we have adopted a case-by-case approach to implementation of the Long-Cannon amendment to the Staggers Rail Act of 1980. That decision, which dealt primarily with procedures for complaint and formal investigation proceedings, stressed the availability of discovery as a means of obtaining from the railroads information relevant to the Long-Cannon factors. In view of the short time frames involved in suspension cases, some variance from a protestant's strict burden under *Arkansas Power & Light* may well be required in suspension proceedings. This is a matter I intend to examine closely in an appropriate case.

APPENDIX B

SERVICE DATE
JUNE 14, 1983

INTERSTATE COMMERCE COMMISSION

DECISION

Docket No. 38885

BURLINGTON NORTHERN RAILROAD COMPANY—
PETITION FOR RECONSIDERATION OF REJECTION

Decided: June 7, 1983

Background

In October 1981, the Burlington Northern Railroad Company (BN) filed Supplement No. 4 to Tariff ICC BN 4187-A to establish as of November 1, 1981, a base rate of $10.95 per ton for the transportation of coal to the Council Bluffs, Iowa generating plant of Iowa Power and Light Company (IPL). At IPL's request, we rejected Supplement 4 because it increased the rate above a level prescribed by the Commission in 1980. The United States Court of Appeals ruled that the rejection was contrary to the Interstate Commerce Act, in *Burlington Northern Railroad Co. v. ICC*, 679 F.2d 934 (D.C. Cir. 1982).

After the court decision, BN refiled the supplement (as Supplement No. 8) on July 14, 1982 to take effect on July 15, 1982 and to establish the $10.95 rate from November 1, 1981—the date the rate would have taken effect but for the Commission's erroneous rejection.

We rejected Supplement No. 8 on July 16, 1982, because of the failure to provide the advance notice required by 49 U.S.C. 10762(c)(3) and 49 C.F.R. 1300.14 (a)(ii) (as amended), and the failure to include a title

page notation showing authority for publication on short notice, as required by 49 C.F.R. 1300.3(h).

On appeal, the Commission allowed the railroad to refile the supplement on twenty days' notice, to take effect from November 1, 1981 (order served December 23, 1982). The Commission used equitable principles to make BN whole. It acknowledged that agency error alone had prevented BN from collecting, since November 1, 1981, the $10.95 rate. The Commission found that BN would be unable to recoup the lost revenues unless the tariff establishing the $10.95 rate took effect from November 1, 1981. The Commission directed BN to apprise it of the amount of the undercharges created by the erroneous rejection of the tariff in 1981 and directed both parties to submit suggested payment schedules.

BN then refiled the supplement (as Supplement No. 10) on twenty days' notice, and the $10.95 rate took effect on February 10, 1983, *nunc pro tunc* to November 1, 1981.

In response to the Commission's instructions, BN filed a proposed schedule for payment of undercharges and interest. BN computed the undercharges to be $8,196,697.54 for the period November 1, 1981 (the date the $10.95 rate would have taken effect but for the erroneous rejection) through February 9, 1983 (the day before Supplement No. 10 became effective). BN proposed an interest rate of 13.3 percent, resulting in $637,963.18 in interest for that period. It proposed a payment schedule of twelve monthly installments, with interest continuing to accrue on the outstanding balance at the daily rate of .0003694 percent (which corresponds to 13.3 percent per annum). The total accrued interest would be paid as a final (thirteenth) installment.

IPL agrees that the principal amount owed is $8,196,697.54. It has offered to pay this amount in two

monthly installments, but *without interest.*[1] It claims that the Commission's decision was expressly limited to the amount of the undercharges and does not permit the assessment of interest charges.

Discussion

The purpose of permitting BN's tariff to take effect in the past is to make BN whole for the revenues it should have been, but was unable, to collect. To render BN whole, IPL must pay interest to compensate for the lost use of the uncollected revenues. IPL is not penalized by the payment of interest. It is simply required to return the value of the benefit it received—the use of the money during this period.

BN proposed that the interest rate used be the average yield of marketable securities of the United States government having a duration of 90 days. This is the formula prescribed in 49 U.S.C. 10707(d) for computing, after a Commission investigation of a proposed rate, any appropriate refunds or undercharges (depending on whether or not the proposed rate had been suspended pending the investigation) to reflect the outcome. BN would use the average yield on October 16, 1981—the date of IPL's original letter to the Commission requesting rejection of the tariff supplement—as the rate applicable to shipments throughout the entire period. It would apply a 13.3 percent[2] interest rate to the number of days from

---

[1] IPL argued that if interest is assessed, it should receive the same rate of interest, to the date of payment of the retroactive amount, if it prevails in any future proceeding before the Commission for reparation for unreasonably high rates for the shipments during this November 1, 1981 through February 9, 1983 period. IPL has not filed such a claim. We need not consider its argument before we receive and rule on any such claim.

[2] Our analysis shows that 13.52 percent was the average yield on October 15, 1981. No new bills were issued on October 16, 1981. The yield on October 29, 1981, the auction date closest to November 1, was 13.35 percent.

each shipment's waybill date excluding Saturdays, Sundays, holidays, and the five-day credit period allowed by Commission rule.

We find the use of the 90-day marketable government securities rate acceptable here, since it has been legislatively prescribed for use in a closely analogous context. However, we do not approve of the selection of the October 16, 1981 date for calculating the rate. IPL owes no money to BN for any date prior to November 1, 1981 —the date the $10.95 rate was first scheduled to go into effect. Moreover, in an era of declining interest rates, to apply the rate in effect at the beginning of the period to all shipments made thereafter could disadvantage IPL unfairly.

Accordingly, we have determined that the average yield for the period November 1, 1981 through February 9, 1983 is 10.5%. Using this rate, we authorize BN to calculate the interest owed for this period.

Since BN will be compensated for any further delay through the payment of interest, IPL may determine whatever payment schedule best fits its needs. However, it should not extend the payments beyond the thirteen-month period which BN has proposed and which we find to be reasonable. When IPL establishes a schedule, BN shall promptly calculate the interest that has and will accrue under that schedule. IPL shall then pay according to that schedule.

We issue this order under our duty to effectuate the mandate of the United States Court of Appeals in *Burlington Northern Railroad Co. v. ICC*, *supra*, and under equitable principles that allow us to remedy the effects of our prior mistakes.

This decision will not affect the quality of the human environment or the conservation of energy resources.

It Is Ordered:

1. IPL shall pay the outstanding principal balance for this period November 1, 1981 through February 9, 1983: $8,196,697.54.

2. IPL shall establish a payment schedule no lengthier than thirteen (13) months.

3. Interest has and will accrue on the outstanding principal balance according to the principles discussed above.

4. Upon the establishment of a payment schedule, BN shall calculate the exact amount of interest owed according to the principles discussed above.

5. IPL shall pay the amount of principal and interest promptly according to the schedule established.

6. This decision will be effective upon the date of service.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison.

[SEAL]

AGATHA L. MERGENOVICH
Secretary

(THIS PAGE INTENTIONALLY LEFT BLANK)